82-1087

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE INTERNATIONAL BROTHERHOOD OF BOILER-MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509,

PETITIONER,

v.

WILLIAM WATTLETON, et al.,

and

STEVE T. TILLMAN, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ALVIN R. UGENT,
207 E. Michigan Street
Milwaukee, WI 53202
(414)271-5655
Attorney for Petitioner.

QUESTIONS PRESENTED

1. Whether the seniority system in question was bonafide within the meaning of Section 703(h) of Title VII because it was not negotiated and maintained for the purpose and with the intent and effect of discriminating against Blacks.
2. Whether responsibility for damages caused by employment discrimination should be apportioned between the employer and union according to actual liability, where the employer had entered into a consent decree before trial which settled all financial obligations to the plaintiffs.
3. Whether a fair trial on liability under Title VII can be conducted where the major defendant has settled any potential obligations to the plaintiffs prior to trial.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED.

THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509, Defendant-Appellant in Court of Appeals for the Seventh Circuit.

WILLIAM WATTLETON, JOHNIE ROBINSON, CLAYTON JACOBS, JOHN ARMSTRONG, ABRAHAM LEFLORE, WARDELL WILSON, CLARENCE SUGGS, DANIEL BROWN, RUGEN MADISON, ROBERT SPEARMAN, FRED J. COLIN, individually and on behalf of others similarly situated. Plaintiffs Appellees, in the Court of Appeals for the Seventh Circuit.

STEVE T. TILLMAN, WILLIAM BELL, CHARLES JONES, CHARLES C. GRAVES, TOMMIE L. BALLET, HENRY E. GRAVES, WILLIE QUEARY, Plaintiffs-Intervenor-Appellees, in the Court of Appeals for the Seventh Circuit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES CONT'D.

TABLE OF AUTHORITIES CONT'D.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1982

No.

THE INTERNATIONAL BROTHERHOOD OF BOILER-MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, LOCAL #1509,

PETITIONER,

v.

WILLIAM WATTLETON, et al.,

and

STEVE T. TILLMAN, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Alvin R. Ugent, of the law firm of Podell, Ugent & Cross, S.C. on behalf of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #1509, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, A-1) is reported as Wattleton v. International Brotherhood of Boilermakers, 686 F.2d 586 (7th Cir. 1982). The opinion of the District Court (App. G, infra, A - 63) is reported as Wattleton v. Ladish Co., 520 F. Supp. 1329 (E.D. Wis. 1981). The memorandum decision of the District Court (App. D, infra, A - 25) approving the consent decree is published as Wattleton v. Ladish Co., 89 F.R.D. 677 (E.D. Wis. 1981).

JURISDICTION

The judgment of the Court of Appeals was entered on August 16, 1982. A petition for a rehearing was denied September 27, 1982. The time within which to file a petition for a writ of certiorari is December 27, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Title VII, Civil Rights Act of 1964, Section 703(a), also known as 42 U.S.C. Section 2000e-2, which reads as follows:

"(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin, or,

(2) to limit, segregate or classify his employees in any

way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's race, color, religion, sex or national origin."

2. Title VII, Civil Rights Act of 1964, Section 703(h), also known as 42 U.S. C. Section 2000e-2(h), which reads as follows:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of

production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religión, sex or national origin. It shall not be unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of

wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Sec. 206(d) of Title 29." (Emphasis added.)

3. Title VII, Civil Rights Act of 1964, Section 703(j), 2 U.S.C. 2000e-2(j), which reads as follows:

"Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national

origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

4. 42 U.S.C. Section 1981, Civil Rights Act of 1870, which reads as follows:

"Equal rights under the law

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

STATEMENT

1. The Ladish Company, hereinafter called "Ladish" or "Company" was started as a forge shop in 1927. It steadily grew and presently makes forgings for space vehicles and jet aircrafts, some forging ranging from forty pounds in weight to three hundred thousand pounds, about fifty percent of its business being with the Government. It does not made a unique product per se, but rather takes special orders for specific and differing forgings, and thus by the very nature of its unique products is a manufacturing plant where "job bidding" and seniority are particularly important to a steady job for its multi-union employees. The Company has always been in exclusive charge of the hiring.

2. The first Union to represent Ladish employees was the International Die Sinkers Conference in April, 1943.

3. The next Union to represent Ladish employees was the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Lodge 1509, hereinafter called "Blacksmiths" or "Local 1509" who are the petitioners herein.

The Blacksmiths, through various departments in its bargaining unit, receive raw materials and warehouse it in the steel stores department, cut it and send it to the forge shop department for forging. The Blacksmiths represent about 1,000 of the 4,000 Ladish employees, and were organized and certified by the National Labor Relations Board in March of 1945. At the present time only 450 Blacksmiths are working due to an economic slowdown.

4. The industrial environment in the Forge Shop was very adverse from the standpoint of heat, air quality and

working environment with sludge an inch deep on the floor, and scale burns frequent, and hammers dropping six stories.

5. If an employee who is a member of the Machinists' union wants to become a member or obtain a job in, for example, the Blacksmiths' union, he would register his intention to transfer into the Blacksmiths' union with the Company's employment department. If, at a future date, the Company were increasing the work force in the Blacksmiths' union, it would go to the transfer-request listing and, in order of plant-wide seniority, give appropriate consideration to that request before proceeding to hire applicants from outside its current employment level.

That employee from the Machinists would have concurrent seniority within the Machinists and Blacksmiths for up to a period of the first 60-days in the

Blacksmiths' unit. Within that 60-day period, the employee could elect to opt out of the Blacksmiths back into the Machinists. Electing to remain within the Blacksmiths' unit, that employee's bargaining unit seniority and departmental seniority would commence as of the first date of entrance into the Blacksmiths.

He would utilize his bargaining unit seniority within the Blacksmiths' unit for job bidding . . . that same date of transfer bargaining seniority would be utilized for lay-off . . . and recall purposes.

6. August 16, 1948 the first black employee was hired by Ladish. Two blacks were hired by Ladish Company in 1948, three in 1950, twenty-four in 1951, twelve in 1952 and fifteen in 1953. Two American Indians were hired by Ladish into the Blacksmiths' union in 1948 and four with Spanish surnames were

hired by the Company in that same year into the Blacksmiths' Union. No blacks were hired by the Company into the Blacksmiths' bargaining unit from 1948 to 1967. However, for a period of ten years, during that time from 1948 to 1957, no one was hired by the Company into the forge shop department of the Blacksmiths.

At one time during the course of their bargaining history the Machinists have allowed any employee from Blacksmiths' bargaining unit to transfer into their unit with full seniority. But as to such "carry-over" seniority, that is seniority which would apply to transfers from one bargaining unit at Ladish into another without loss of "bargaining unit" seniority, there was only one exception, and that for a limited period of time from 1952 to January 27, 1955 when the Blacksmiths' Union opened its doors,

so to speak. If a black machinist and a white machinist both wanted to transfer into the Blacksmiths' union, they go with the same loss of seniority. It is just the application of prohibition of "carry-over" seniority that applies to all, irrespective of race.

7. In 1973 and 1974, the Office of Federal Contract Compliance (OFCC) conducted an audit of Ladish's Cudahy facility which included an analysis of the company's then existing workforce. Based on its audit, its examination of documents and evidence furnished by Ladish, OFCC concluded that an affected class existed at Ladish, consisting of all Blacks who were hired by the company prior to January 22, 1968, and who were placed by Ladish in jobs under the jurisdiction of the Machinists.

8. Shortly after the OFCC reached the conclusion that Ladish had an affected

class of Black employees who had suffered employment discrimination, the first of 18 Blacks employed by Ladish filed a charge of employment discrimination with the Milwaukee office of the Equal Employment Opportunity Commission, naming as respondents the Ladish Company and the seven unions with which it had collective bargaining agreements. On December 29, 1975, a suit was filed by 11 Black employees of Ladish, on their behalf and on behalf of all others similarly situated. Later, seven other Black employees filed similar EEOC charges, received letters concerning their right to sue; and on May 3, 1977, filed a motion for leave to intervene as plaintiffs in the suit. This was allowed; and on February 12, 1980, the district court granted, in part plaintiffs' motion to certify the class,

9. On the same date, the court

granted a motion that severed the issue of liability from those of damages and remedies, in the event liability was established at trial. Then, at a conference held on November 3, 1980, plaintiffs, the Ladish Company, and four of the seven unions, informed the district judge that they were prepared to settle the case as to them.[1] They reported agreement to a proposed consent decree, and requested a hearing. Notices were issued to members of the class, a date was set for the court to hear objections, approve or disapprove the consent decree, and enter an appropriate order. The hearing, a lengthy one, was begun on December 22,

[1]The unions were (1) International Federation of Professional and Technical Engineers, Local #92 (IFPTE); (2) International Brotherhood of Firement and Oilers, Local #125 (IBFO); (3) International Brotherhood of Electrical Workers, Local #494 (IBEW); and (4) Associated Unions of America, Local #500 (AUA).

1980; and on February 13, 1981, the court reviewed the proposed consent decree and issued a Memorandum approving it. (Wattleton v. Ladish Co., 89 F.R.D. 677 (E.D. Wis. 1981).

The effect of the settlement was to remove the Ladish Company and the four unions from the suit. This having been done, the remaining issues between plaintiffs, the remaining union locals: the Machinists,[2] the Die Sinkers,[3] and the Blacksmiths, were set for trial. They were heard to the court on plaintiffs' contention that (1) Ladish, with the full knowledge, cooperation and complicity of the three unions, maintained a policy and practice of hiring Blacks and assigning them to the dirtiest, lowest

[2]The International Association of Machinists and Aerospace Workers, District No. 10, Local #1862 (Machinists).

[3]International Die Sinkers Conference and Milwaukee Die Sinkers, Lodge #140 (Die Sinkers).

paying, and least desirable jobs within the jurisdiction of the Machinists; (2) Ladish, with the acquiescence of the three unions, maintained a policy of refusing to promote and transfer Blacks to better paying and more desirable jobs within their jurisdictions; (3) the three unions, by reason of seniority systems in their respective collective bargaining agreements, perpetuated the initial discrimination against Blacks because their seniority systems prevented them from transferring to better paying and more desirable jobs with full carryover seniority within the respective jurisdictions; and (4) that the Machinists' bargaining unit failed to properly and fairly represent its Black members.

10. After hearing evidence, the district court made findings of fact and

reached conclusions of law published in Wattleton v. Ladish Co., 520 F.Supp. 1329 (E.D. Wis. 1981). It found that during the period in question, all persons who were hired by Ladish and given jobs in the Machinists' and Die Sinkers' bargaining unit were accepted without regard to race or national origin, 520 F.Supp. at 1338; and that the Machinists did not fail to properly and fairly represent their Black members. 520 F.Supp. at 1347. But as to the Blacksmiths, the district court weighed the credibility of four Blacks who testified about their work experience at Ladish, reviewed the record, and found that no Black employee in the Cudahy plant transferred to a job under the jurisdiction of the Blacksmiths because its members, expressing its policy, made it clear to Ladish, and to the Blacks, that the local union would not accept

them into its bargaining unit, 520 F.Supp. at 1341; that the OFCC determinations, the testimony of Ladish's Black employees, and the operation of the challenged systems were persuasive evidence that the seniority provisions had perpetuated the effects of prior discriminatory practices and have carried their effects into the present, 520 F.Supp. at 1341; that the challenged seniority systems in the separate bargaining units were rational, in conformance with industry practice, and with the provisions of the National Relations Act, 520 F.Supp. at 1342; and that because they were originally negotiated at a time when Blacks were not employed at Ladish, the seniority systems of the three unions, including the Blacksmiths', did not have their genesis in racial discrimination. 520 F.Supp. at 1343.

11. Having made these findings, the court then turned to the question whether the challenged seniority systems, after their genesis, were thereafter negotiated and maintained free from any illegal purpose. 520 F.Supp. at 1343. It found that there being no evidence to the contrary, the Black plaintiffs had not established that the seniority systems which existed under the collective bargaining agreements between Ladish, the Machinists, and the Die Sinkers were maintained with a purpose and intent to discriminate against them. 520 F.Supp. at 1346. But tracing the history of the Ladish-Blacksmiths' collective bargaining agreements, as it had in those between Ladish and the other two unions, the district court found that while the Blacksmiths' seniority system under examination was essentially the same as the one contained in the original

agreement, the provisions had not been carried forward unchanged. In fact, there had been three changes, and all of them "coincided with the time Ladish first began to hire blacks in 1948 . . . or with times of a steady increase in the hiring of blacks at Ladish." 520 F.Supp. at 1345.

The first change was included in the agreement effective August 22, 1949 to September 30, 1951 and provided that plantwide seniority would carry over to jobs under the jurisdiction of the Blacksmiths for purposes of layoff. This difference benefitted only Caucasians who, without difficulty, transferred into the Blacksmiths' bargaining unit; no Black was successful in making such a transfer. The second was elimination, in the same collective bargaining agreement, of a nondiscrimination clause that was not again included in an agree-

ment between Ladish and the Blacksmiths until passage of Title VII in 1964. The third was inclusion in the August 22, 1949 agreement of a provision regarding interbargaining unit tranfers which stated that:

> "Permanent inter-bargaining unit transfers will be made by agreement between Management and the Bargaining Committee of the unit to which the employee is being transferred."

The district court found that on August 22, 1949 "and thereafter, [this provision] gave the Blacksmiths virtual veto power over interbargaining unit transfers." 520 F.Supp. at 1345.

Based on the evidence that showed these three changes, the evidence relating to the feelings of individual blacksmiths toward transfers by Blacks to jobs in their unit, the evidence which showed that Caucasians transferred to jobs under the Blacksmiths with full carryover seniority

while at the same time Blacks were discouraged from doing so; and having drawn reasonable inferences therefrom, the district court found "that the challenged seniority system contained in the Ladish-Blacksmiths' collective bargaining agreement, inter alia, was negotiated and maintained with a purpose of preventing only blacks from entering into jobs under the jurisdiction of the Blacksmiths." . . . 520 S.Supp. at 1346; and, "that the seniority systems negotiated between Ladish and the Blacksmiths have and were intended to have a disparate impact on black workers at Ladish." 520 F.Supp. at 1347. Therefore, the court concluded that "the seniority system of the Blacksmiths is not bona fide within the meaning of 703(h) of Title VII."

12. The decision was appealed to the Seventh Circuit Court of Appeals. On August 16, 1982, the circuit court issued

its findings that

(1) The district court's findings of fact are not clearly erroneous; they are supported by substantial evidence on the record.

(2) The district court was correct in concluding that the Blacksmiths' seniority system is not bona fide within the meaning of Section 703(h) of Title VII.

REASONS FOR GRANTING THE PETITION

I. The Seniority System in Question Was Not Negotiated and Maintained for the Purpose and With the Intent and Effect of Discriminating Against Blacks.

At the conclusion of the trial in the district court, Judge John . Reynolds stated:

> "In practically all these civil rights cases to a certain extent it's kind of like a generation on trial, I won't say all of them but at least many of them I have been involved in, the current officials really weren't there making the decisions that this Court's decision is based upon. So really it isn't--you can say it's the generation on trial, but another way to look at it, it's probably an institution, and by historical acts, historical facts, the history of the institution, the present institution or the officials are held responsible for what their predecessors in office did." App. K, p. A-127-8.

The evidence upon which "intent to discriminate" was found was historical

data going back as far as thirty years from the date of trial. This evidence consisted of the following:

(1) Unidentified company officials told four Black employees that they could not transfer into the Blacksmiths bargaining unit because the Blacksmiths would not like it. These incidents took place in the 1950's. The Black employees never filed formal transfer requests. (Findings of Fact, para. 37-44)

(2) Experts on labor history testified on the history of racism in the labor movement in general.

(3) No Blacks transferred in the Blacksmiths bargaining unit between 1948 and 1968. Many reasons for this can be given: few Blacks were hired by the Company, Blacks may not have wanted to transfer, and the Company appears to have discouraged Blacks from transfer-

ing.

(4) Certain changes in the Blacksmiths 1949-51 collective bargaining agreement with Ladish were made. These changes supported the court's inference that the Blacksmiths were attempting to keep Blacks out of their bargaining unit.

(5) Blacksmith union bargaining committee chairman testified that while he had no prejudice toward Blacks, some members of the union did not share his feelings. (Finding of Fact, para. 45).

The Blacksmith's do not question the trial court's authority to weigh this evidence and draw reasonable inferences from it. However, in concluding that the seniority system in question was not bonafide because it was maintained for the purpose and with the intent and effect of discrimi-

nating against Blacks, the court stepped outside the bounds established in Teamsters v. U.S., 431 U.S. 324 (1977). The purpose of Title VII is to provide remedies for discrimination suffered by minorities. Those remedies include measures to promote equal employment opportunity and to provide monetary compensation for the victims. It has been an open question just how far back the court will search to find evidence of discriminatory intent. If one wishes to go back far enough, discrimination against minorities can be found in almost every institution in this society, including most businesses and unions. The Blacksmiths contend that it is not the purpose of Title VII to ferret out such discrimination.

There are several reasons for not conducting a penetrating and extensive

historical search. One is that there is no real remedy for discrimination which occurred twenty and more years ago. It is only current employees who can be given better employment opportunities. A second is that it is very difficult to prove exactly who discriminated and in what way when names cannot be remembered and witnesses cannot be produced and cross examined. The finder of fact is forced to base its conclusions on tenuous inferences and highly circumstantial evidence. Finally, to assess monetary damages for discrimination which occurred over ten years before the Civil Rights Act of 1964 was adopted is more punitive that it is compensatory.

Teamsters was intended to protect seniority systems in effect prior to the enactment of Title VII. It was not intended to authorize an extensive

search into the history of either an employer's or a union's relations with minorities.

II. In an Employment Discrimination Action, Where the Employer Enters Into a Consent Decree Which Settles It's Financial Obligation to the Plaintiffs, the Non-Settling Defendant Union, If Found Liable at Trial, Should Have Damages Apportioned According to It's Actual Liability.

A. Present Policy is that the Trial Court Will Not Rule on Possible Contribution or Indemnification Where a Non-Settling Defendant May Be Liable for More than It's Equitable Share.

Trial courts have the authority to approve consent decrees entered into by plaintiffs and one or more defendants

in actions involving complex and costly litigation. A consent decree in class action employment discrimination cases typically involves agreement by the employer to certain remedial measures which promote equal employment opportunity at the workplace. The settlement may also involve monetary payment to the defendants. In the present case, the settlement involved both of these features. Wattleton v. Ladish Co., 89 F.R.D. 677 (E.D. Wis. 1981). It should be noted that Ladish settled its total financial obligation to the plaintiffs for $200,000, 89 F.R.D. at 684. The result of the settlement is that the employer will not have to pay any more money to the plaintiffs regardless of the total amount of damages found. That amount will be the obligation of the non-

settling defendant. Thus, the non-settling defendant is liable for more than its equitable share of the damages.

The consent decree in this case explains the distribution of the $200,000 settlement and states:

> "This will not preclude plaintiffs from recovering additional fees, costs and expenses from non-settling defendants." 89 F.R.D. at 685.

The court also stated that in regard to the defendants ability to pay:

> "The factor of defendants' ability to pay is not relevant to this case." 89 F.R.D. at 681.

This procedure is consistent with other district courts' practice. The court will not rule on "contribution" or "indemnification" between settling and non-settling defendants because (1) the non-settling defendant is not a party to the consent decree and (2)

the issue is premature because the existence of liability is not established until trial. In re Corrugated Container Anti-Trust Litigation, 643 F.2d 195 (5th Cir. 1981), In re Beef Industry Antitrust Litigation, 607 F.2d 167 (5th Cir. 1979), Seiffer v. Topsy's Intern., Inc., 70 F.R.D. 622 (D. Kan. 1976), Herbst v. International Tel. & Tel. Corp., 72 F.R.D. 85 (D. Conn. 1976) and Wainwright v. Kraftco Corp., 53 F.R.D. 78 (N.D. Ga. 1971).

The courts have actually confused the issue as to whether non-settling defendants have a right to object to the terms of a consent decree to which they are not parties, in contrast to their right as parties to the suit to not be required to pay more than their equitable share of damages. Some support for the right to indemnification was noted in In re Beef Industry, supra,

where the court acknowledged the opinion of Professor Newbery:

> "non-settling defendants... may object to any terms which preclude them from seeking indemnification from settling defendants." Supra at 172.

In practice, however, courts do not allow non-settling defendants to seek apportionment of damages. Nor do they have a remedy if the consent decree is silent, since they are not parties to that agreement.

An argument could be raised that a non-settling defendant has no right to object to the result because it had the opportunity to enter into the consent decree and thus define and limit its liability. This argument is fallacious for three reasons:

(1) The non-settling defendant may have a good faith belief that it did not discriminate. If defendants must enter into consent decrees only

out of fear that they will otherwise be liable for a disproportionate share of the damages, the process becomes more akin to blackmail than to a fair and reasonable settlement of differences.

(2) Where the non-settling defendant is a union, it has little power to take remedial measures to promote equal employment opportunity. That is almost exclusively within the power of the employer. In this case, the Blacksmith union was found guilty of an "intent" to discriminate on the basis of certain contract language and other alleged practices which took place between twenty and thirty years ago. The remedy to be implemented by the employer under the terms of the consent decree is to hire, promote and transfer qualified minorities. The Blacksmiths have no objection to this.

Moreover, the question is moot in regard to them since their bargaining unit has shrunk from approximately 1,000 to 450 members, with hiring and promotion opportunities being almost non-existent. Their involvement in the consent decree is irrelevant.

(3) The Blacksmith's union has extremely limited financial resources in comparison with the employer, Ladish Company. It did not have the ability to "buy its way" into a settlement, to any meaningful degree.

For these reasons, the present policy of not apportioning damages where a consent decree settles the financial obligation of some defendants but not others should be changed.

B. The Policy of Apportionment of Damages As In Duty of Fair Representation Cases Should Be Adopted.

Duty of Fair Representation cases, which are brought under the National Labor Relations Act, can involve a finding that both the employer and the union have breached the duty and are liable for damages. Vaca v. Sipes, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967) established the principle that damages must be apportioned between the employer and union according to the fault of each.

> "The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." At 386 U.S. at 197, 198.

The principle was reaffirmed in Czosek v. O'Mara, 397 U.S. 25, 25 L. Ed. 2d 21, 90 S. Ct. 770 (1970).

"The petitioning union defendants ...[insist] that they may not be sued alone for breach of duty when the damage to employees had its roots in their discharge by the railroad prior to the union's alleged refusal to process grievances. Apparently fearing that if sued alone they may be forced to pay damages for which the employer is wholly or partly responsible, the petitioners claim error in the Court of Appeals' affirmance of the dismissal of the suit against the railroad. These fears are groundless. The Court of Appeals permitted the railroad to be made a party to the suit if it is properly alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer was in any other way implicated in the union's alleged discriminatory action. If these allegations are not made and the employer is not a party defendant, judgment against petitioners can in any event be had only for those damages that flowed from their own conduct. Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances

> added to the difficulty and expense of collecting from the employer. If both the union and the employer have independently caused damage to employees, the union cannot complain if separate actions are brought against it and the employer for the portion of the total damages caused by each." 397 U.S. at 28, 29

The principle has been followed consistently by Courts of Appeals in recent cases. Milstead v. International Bro. of Teamsters, Etc., 649 F.2d 365 (6th Cir. 1981), Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980), Self v. Drivers, Chauffers, Warehousemen, Etc., 620 F.2d 439 (4th Cir. 1980), Anderson v. United Paperworkers Intern. U., Etc., 641 F.2d 574 (8th Cir. 1981), Wells v. Southern Airways, Inc., 616 F.2d 107 (5th Cir. 1980) and Miller V. Gateway Transp. Co., Inc., 616 F.2d 272 (7th Cir. 1980).

The United States Supreme Court has recognized the inequity which would re-

sult from allowing damages to be paid by only one of the parties liable for illegal conduct. Duty of Fair Representation cases are closely analogous to the present case in that both the employer and union may be liable to employees for violation of a statutory right. The Blacksmiths contend that the same principle of apportionment of damages should apply in both cases.

C. Apportionment of Damages Between Defendants Liable for Violation of Title VII Is Appropriate Where A Consent Decree Precluded Any Possibility of Contribution or Indemnification.

The federal common law right to contribution, while generally recognized, was discussed in regard to Title VII actions in Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 67 L. Ed.

2d 750, 101 S. Ct. 1571 (1981). See 451 U.S. at 84, Footnote 11 on the common law right to contribution.

In Northwest Airlines, aggrieved female employees sued the employer under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 for backpay due to wage differentials between male and female cabin attendants. The employer was held liable and sued the union for contribution based on the fact that the collective bargaining agreement containing the discriminatory provisions had also been agreed to by the union.

The court held that the employer had no right to contribution from the union under either Title VII or federal common law. Title VII could not be interpreted to support a statutory right to contribution because the statute was expressly directed against

employers. 451 U.S. at 92. No manifestation of congressional intent for the remedy of contribution could be found. As for the body of federal common law which has recognized contribution, that is limited, according to the court, to situations where congress has not developed a statutory scheme.

The issue with which we must deal is whether Northwest Airlines precludes apportionment of damages between the employer and union in this case. The Blacksmith's union contends that it does not.

In Northwest Airlines the plaintiffs sued only the employer. The employer then brought a separate action for contribution against the union. It would seem clear that Title VII was not enacted for this purpose. However, in the present case, both the employer and union were found liable to the plaintiffs

for damages. The employer, however, is not part of the suit because of the settlement agreement. The union has no basis to seek contribution from the employer. Rather, the union seeks to have damages apportioned so that it is required only to pay for that proportion of the damages it actually caused.

While the present case does not involve contribution, Northwest Airlines need not be read to preclude the possibility of contribution for a union. Title VII is aimed at discrimination by employers. It is an extremely rare case where a union, alone, is liable for discrimination. Thus, unions should have the remedy of contribution available to them.

The other reason why Northwest Airlines is inapplicable to this case is because the inequity did not arise

under Title VII, but as a result of the consent decree. The remedy being sought is not a Title VII remedy. Neither congress nor the federal courts have developed any body of law to deal with the liability of non-settling defendants. Thus, it is appropriate to apply federal common law to this situation, because it is not precluded by any statutory remedy.

D. In Spite of the Inability of the Non-Settling Defendant Union to Obtain Any Protection Against Liability for a Disproportionate Share of the Damages, the Settling Defendant Company Was Able to Obtain the Right to Contribution.

Further evidence of the one-sided protection available to the settling defendant is reflected in the fact that

the employer, Ladish Co., was able to obtain the right to contribution from non-settling defendants as part of the consent decree.

"IX. ATTORNEYS' FEES

> Counsel for plaintiffs shall receive from Ladish Co. attorneys' fees, costs and expenses in an amount agreed upon by the plaintiffs and Ladish Co. and approved by the Court, or if no approval is granted, an amount set by the Court. Such amount shall not preclude plaintiffs from recovering additional fees, costs and expenses from the nonsettling defendants." Wattleton v. Ladish Co., Civil Action No. 75-C-746, Consent Decree at 10. App. D, p. A-53.

This provision was clearly intended to state a right to contribution for the settling defendant.

It would be grossly inequitable for the court to allow one defendant in a suit the right to contribution without allowing other defendants the same right.

III. A Fair Trial on Liability Under

Title VII Cannot Be Conducted Where the Major Defendant, the Employer, Has Settled Any Potential Obligations to the Plaintiffs Prior to Trial.

The defendant employer in this case entered into a consent decree with the plaintiffs through which it discharged all obligations to the plaintiffs prior to a trial on liability. The result was a trial in which the employer did not participate, although the court did attempt to determine its liability. The unions were on trial and attempted to prove that they had not discriminated against the plaintiffs.

The Blacksmiths contend that when the employer settled with the plaintiffs, the Blacksmiths and other unions should have been dismissed. Title VII is intended primarily to remedy discrimination perpetrated by employers. Unions,

if liable at all, are usually only secondarily liable for their participation in or acquiescence to discriminatory contract provisions. To hold a union liable for the damages accumulated in this protracted class action suit is contrary to labor policy in this country. The problem is exacerbated by the fact that the union in question is a small, craft union with extremely limited resources. The practical effect of holding the Blacksmiths liable for the damages will very likely be bankruptcy.

For these reasons, the Blacksmiths argue that the verdict of the trial court, and the maintenance of the trial itself were contrary to public policy. The verdict of the trial court should be overturned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALVIN R. UGENT
207 E. Michigan Street,
Suite 315,
Milwaukee, WI 53202
(414)271-5655
Attorney for Petitioner.